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Chief - Supreme Court of S.

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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

No. 151.

THE SEVEN UP COMPANY,
Petitioner,

v.

CHEER UP SALES COMPANY OF ST. LOUIS, MISSOURI,
a Corporation, AMERICAN SODA WATER COMPANY,
a Corporation, and ORANGE SMILE SIRUP
COMPANY, a Corporation,
Respondents.

**RESPONDENTS' BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI.**

OLIVER T. REMMERS,
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a Corporation, and ORANGE SMILE SIRUP
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Respondents.

**RESPONDENTS' BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI.**

WRIT SHOULD BE DENIED.

I.

1. No new or important question of federal law is involved. The point has been ruled on repeatedly by this Court and settled by the uniformity of the decisions.

Liggett & Myers Tobacco Co. v. Finzer, 128 U. S.
182;

Coates v. Merrick, 149 U. S. 562;

Standard Paint Co. v. Trinidad Asphalt Mfg. Co.,
220 U. S. 446;
Warner v. Lilly, 265 U. S. 526;
Joseph Schlitz Brewing Co. v. Houston Ice & Brew-
ing Co., 250 U. S. 28, 30;
Kellogg Co. v. National Biscuit Co., 305 U. S. 111,
121.

II.

Petitioner on this point relies on **Saxlehner v. Eisner & Mendelson**, 179 U. S. 19, 33. The only similarity between that case decided October 15, 1900, and this case is that both are suits over trade names, but the facts are widely dissimilar as is hereinafter noted at page 6.

III.

No local law is involved. The Federal decisions are in accord with the Missouri courts' rulings and vice versa. **McCann v. Anthony**, 21 Mo. App. 83, relied on by petitioner, was decided by the St. Louis Court of Appeals on February 23, 1886, and has no application here, not because of its age, but only because the trade name of the defendant there was not involved. Respondents are unable to find any Missouri decisions comforting petitioner. The Missouri cases supporting respondents' position are:

Ralston Purina v. Checker Food Products Co., 80 S. W. (2d) 717, St. Louis Court of Appeals;
National Bank in North Kansas City v. Bank of North Kansas City, 172 S. W. (2d) 967, Kansas City Court of Appeals;
Nicholson v. Stickney, 158 Mo. 158, Missouri Supreme Court.

ARGUMENT.

I.

An analysis of the various decisions relating to trade-marks and trade names establishes a definite and uniform line of reasoning. These criteria are:

1. Are the dominant characteristics of the trade names the same?
2. Do they look alike to the ordinary observer?
3. Do they have the same meaning or connotation?
4. Is the sound or pronunciation the same?
5. Is the design of the newcomer's mark substantially the same as that of the first user?

On unfair competition the courts have held:

1. The features common to the trade cannot be monopolized.
2. Neither color nor common package can be made exclusive.
3. While the combinations of common words in a phrase, not descriptive, may be protected, a common word used in the phrase cannot be monopolized, and the similarity or identity must exist in the dominant word.
4. While distinctive dress of goods cannot be imitated to perpetrate fraud or deception, the first comer cannot complain where he has adopted features of the dress common to the trade, or standard packages as to size, shape or color, unless the **name** or **mark**, itself, of the goods will probably deceive those who exercise **ordinary care** to discover the source of manufacture.

Respondents submit that upon the above analysis there is no infringement or unfair competition in Cheer Up and the District Court for the Eastern District of Missouri, Eastern Division, and the Eighth Circuit Court of Appeals have so held. These courts have held that the dominant characteristic of petitioner's label is the numeral "7" and "Cheer" the dominant word in respondents' trade name, notwithstanding petitioner's transparent claim that "up" is dominant. The two names have meanings and connotations not even remotely similar. Petitioner's trade name is copied from that of a card game. Respondents' trade name relates to a state of mind. The design of respondents' label is distinctly different from that of petitioner's. The pronunciation of one has no similarity to the other.

For the first time in all this litigation petitioner has adopted "up" as a "surname" (brief p. 16). However, upon petitioner's label the numeral "7" alone is many times the size of "up", so that word sinks into insignificance beside the numeral. Petitioner by the design of its label has made "7" the dominant and characteristic part of its label. Petitioner itself chose what part of its trade name should take dominion over the other and by that characterization petitioner is bound.

"The names and labels are unlike to the eyes, unlike to the ear, unlike in spelling, unlike in meaning and unlike in suggestion." Quotation from **Potter Drug & Chemical Co. v. Pasfield Soap Co.**, 102 F. 490, wherein it was held that "Cuticle Soap" did not infringe "Cuticura Soap."

The foregoing formula is followed in all or nearly all of the cases cited by petitioner. Petitioner cites **Frankfort Distilleries v. Kasko Distillers Products Corporation**, 111 F. (2d) 481 (p. 10 of brief), wherein the Court of Customs and Patent Appeals held that "Maryland Rose" was confusingly similar to "Four Roses" for whiskey. But in summarizing the two marks, the Court found that

“roses” was the dominant word and that the applicant had tendered disclaimer of the geographical term “Maryland.”

Then, too, in **Langendorf United Bakeries v. General Foods**, 125 F. (2d) 159, by the Court of Customs and Patent Appeals (p. 10 of petitioner's brief), that Court held that “Wheato-Nuts” as a name for a breakfast food cereal composed chiefly of wheat products was confusingly similar to the registered trade-mark “Grape Nuts” for the reason that “Wheato” was merely descriptive and the dominant part of the trade name was “Nuts.”

Petitioner relies upon **Burstein v. Seven-Up Company** (C. C. P. A.), 111 F. (2d) 903, but there the Court found the names had the same connotation. Here is what the Court said (l. c. 904):

“The brief on behalf of appellant points out that ‘Seven Up’ is the name of a well-known game played with cards. We assume that the court is expected to take judicial knowledge of this fact, as did the Examiner of Interferences. When this is done, we think we must also take cognizance of the fact that in playing the game the word ‘High’ (of which ‘Hy’ is a misspelling) is one of frequent use. So, when the per se meaning of the respective terms (we agree they are arbitrary as applied to the goods) is considered, there is, it appears to us, a suggestiveness of similarity. Appellee's marks designate a game and appellant's syllable ‘Hy’ a point in that game.”

As to **The Seven-Up Co. v. Gerald G. Balsh**, 511 O. G. 805, cited by petitioner (pp. 9, 15 of brief), involving “Lemon Up,” it is easily recognized that “Lemon” is descriptive of the product and therefore is not registerable, leaving only the word “up.”

The petitioner (p. 10 of its brief) admits that “It is true that decisions of the Court of Customs and Patent

Appeals are not binding as judicial precedents and are not reviewable by this Court," nevertheless cites as authority cases by that court and asserts conflict with this decision of the Eighth Circuit. However, there is no conflict as late as October 2, 1944, for that Court in the case of *Miles Laboratories, Inc., v. Foley & Co.*, 144 F. (2d) 888, held that the trademarks "Vitamiles" and "Vitabuild" as applied to vitamin pills are distinctive in character and confusion is not likely to result from their concurrent use; that neither party could successfully contend that it is entitled to preempt the field to "vita."

II.

The only similarity between the **Saxlehner v. Eisner & Mendelson Company** (Hunyadi case), 179 U. S. 19, 33, decided October 15, 1900, and this case is that both are suits over trade names. There the similarity comes to an abrupt conclusion. The facts in the Hunyadi case as revealed in the decision are that while the full name of the Hungarian mineral water, plaintiff's product, was Hunyadi Janos, it was known throughout the United States and England as "Hunyadi" (l. c. 20, 21). This water was put up in "novel style of bottles and a peculiar label." The defendant also bottled Hungarian waters and called them "Hunyadi Lazlo" and "Hunyadi Matzas" and was selling this water "in bottles of the same size and shape as the plaintiff's containing a label in three parallel panels of the same colors, size and general design as those of the plaintiff" (l. c. 30). Therefore defendant counterfeited plaintiff's novel style of bottle and peculiar label. Mr. Justice Brown observed (l. c. 31):

"Practically the only defenses pressed upon our attention are those of abandonment and laches."

Not even a remote parallel can be drawn between the Hunyadi case and this case.

The bottles used by 7 up are of stock style known as "water bottles" and were freely used in the soft drink trade for 25 years before 7 up started in business (R. 369, R. 434, R. 439, R. 473). The 7 up label and that of Cheer Up are dissimilar in size, shape, design and color.

III.

McCann v. Anthony, 21 Mo. App. 83, is relied on by petitioner. That case was decided by the St. Louis Court of Appeals on February 23, 1886. The trade name of the defendant was not involved. The sole question decided by the St. Louis Court of Appeals was similarity of label and with that decision respondents find no fault. From the report of that case we find (l. c. 87, and p. 31 petitioner's brief) that:

"* * * In the year 1883, the plaintiffs began putting their 'Old Coon Smoking Tobacco' in cloth bags, retaining the above label, which they had previously used on the paper bags, in which they had been accustomed to put up the same tobacco. Soon afterwards, namely, in the fall of 1883, the defendant began putting up his 'Old Bachelor Smoking Tobacco' in cloth bags of the same size, at the same time changing his label, which previously had borne no colorable resemblance to the above label of the plaintiffs, to a label of the form, size, and color, substantially as follows, with the exception of the words 'Not Old Coon':

(label)

"As soon as the plaintiffs discovered that the defendant was putting up his tobacco with this label, they took the advice of counsel, and, under their instructions, a letter was written by their attorney to the defendant on the twenty-ninth of December, 1883, notifying him that his label deceived the public. The defendant replied that if that was so he would make some change in his label so that the public would not

be deceived; and accordingly he made a change by printing on his label in large black letters the words 'Not Old Coon,' as above shown."

Missouri Cases in Harmony With 8th Circuit's Decision.

In **Ralston Purina v. Checker Food Products Company**, 80 S. W. (2d) 717, the St. Louis Circuit Court dismissed plaintiff's bill and, on appeal to the St. Louis Court of Appeals, this was affirmed. Plaintiff had registered its trademark "Checkerboard" for its various food products. Defendant manufactured and sold a product similar to one of plaintiff's. Plaintiff's "Checkerboard" was red and white; defendant's a dull green. The Court denied injunction enjoining the use of "checker" in defendant's corporate name and to designate its food products, saying, l. c. 720:

"And it seems almost inconceivable to us, as we view the numerous exhibits in the case, that anyone would be beguiled by defendant's marking into the purchase of one of its products believing that it belonged to plaintiff's checkerboard line. In fact, we are led from the whole record to believe that the public has been trained and induced to seek out and call for plaintiff's products by their particular identifying names, rather than as checkerboard products, and that any chance of confusion by reason of defendant's present marking of the goods and its use of the trade-name 'Checker' is remote indeed."

The Kansas City Court of Appeals in **The National Bank in North Kansas City v. Bank of North Kansas City**, 172 S. W. (2d) 967, l. c. 969, stated:

"It seems clear to us that the name The National Bank in North Kansas City is quite different from the corporate name Bank of North Kansas City. The dominant feature of plaintiff's title is 'The National.' The public generally recognizes and understands

many of the differences in a national bank and a state bank, and we can see no justifiable basis for the contention that the names are so similar that persons and institutions in the use of reasonable care are likely to be deceived thereby."

The Missouri Supreme Court in **Nicholson v. Stickney**, 158 Mo. 158, held there was no infringement in the use of the picture of the St. Louis Union Station on cigar boxes where one was labeled "Union Station, St. Louis" and the other "Gilpin, Union Station."

Comment on Petitioner's Citations and Observations.

In the case of **In re Coca-Cola Bottling Company of Los Angeles**, 49 F. (2d) 838, cited by petitioner (Brief p. 9), the Court of Customs and Patent Appeals clearly followed the rule in finding that "Lemon Frost" infringed upon "Jack Frost" for the very obvious reason that "Lemon" was descriptive and alone would not be registerable and in common parlance "Frost" and "Jack Frost" are frequently used interchangeably.

Respondents emphatically dispute petitioner's statement (p. 5 of its brief) that "there is not a single finding of fact by the trial court, nor a single conclusion by the Circuit Court of Appeals which is based on conflicting testimony." H. C. Grigg, president of the complainant corporation, stated that in 1929 his company was the first to use lemon-lime with sodium and lithium (R. 98-99, 102) and that it was an original drink, dissimilar to any other drink in combination of elements. However, Defendants' Exhibit 9 (R. 505), being the issue of the National Bottler's Magazine of May 15, 1929, contained the illustrated advertisement of "Virginia Dare" lime and lithia in the green bottle and labeled and published in the same issue (Def. Ex. 9a) (R. 506) was an advertisement of "7 up" saying it was made of seven aromatics, blended with

carmel color. Grigg (R. 111) said his company had designed the crown. Later he admitted the standard crown for beer and soda bottles had been in use for many years prior to the establishment of his company. What he meant was his company designed the printing on the crown. He stated (R. 135) that in 1932 his company advertised that the bottlers of "7 up" must use a seven ounce flint (R. 131) green or brown bottle. Second-hand bottles were recommended (R. 270) and that green bottles were in use by others before used by plaintiff (R. 272-273).

Grigg testified that his father had coined the word "lithiated" (R. 161), and that it had never been used before; that it was original with his company. Defendants proved with their Exhibits 2, 3 and 4 (R. 47-487) that the Pure Food Regulations of 1908 required the use of the word "lithiated" when lithium salts were added, and in Fenner's Twentieth Century Formulary published in 1904 was found the word "lithiated," and the book "Beverages and Their Adulterations," by Dr. Harvey W. Wiley, wherein Dr. Wiley referred to the food and drug regulation requiring the use of the word "lithiated."

Petitioner, during the trial and on appeal, asserted and reasserted that it was the first to use the green bottle with labels for lemon-lime soda (R. 5), was the first to use two color applied color labels, all of which was contradicted by the testimony offered by respondents. The trial court resolved those controverted issues in favor of defendants and the Circuit Court of Appeals affirmed.

Petitioner asserted and reasserted in its brief before the trial court and before the Eighth Circuit that respondents copied plaintiff's package, that is, green glass, when petitioner and all of the trade knew that green glass bottles for soda water were in common use for many years prior to the advent of 7 up (R. 434, R. 439, 471, R. 473). The same claim was made as to the particular shape of the bottle when that shape was known to the trade for decades as a "water bottle."

IV.

No Question of Foreign Trade or Treaties Involved.

Petitioner spends considerable space (Brief, pp. 12, 13, 14) on "(C) importance of the question presented from the viewpoint of foreign commerce and trade." What that question has to do with the issues presented here respondent is unable to comprehend. Petitioner cites **Bacardi Corporation v. Manuel I. Domenech**, 311 U. S. 150. Mr. Chief Justice Hughes, speaking for the Court and interpreting the General Inter-American Convention for Trademark and Commercial Protection signed at Washington on February 20, 1929, stated that, among the many purposes of the convention, l. c. 159:

"It is further provided that labels, industrial designs and slogans used to identify or to advertise goods shall receive the same protection accorded to trademarks in countries where they are considered as such, upon compliance with the requirements of the domestic trademark law (Art. 5). The owner of a mark protected in one of the contracting states is permitted to oppose registration or deposit of an interfering mark (Art. 7); * * *."

And again Mr. Chief Justice Hughes, l. c. 163, found that the convention provided that:

"If duly registered or legally protected in one of the contracting states, the mark is to be admitted to registration or deposit and is to be legally protected in the other contracting states. The condition of that protection in the other states is compliance 'with the formal provisions' of the domestic law. This clearly indicates that formalities or procedural requisites are envisaged and that when these have been met it is the intent of the treaty to confer a substantive right to the protection of the foreign mark."

It is therefore clear that the trademark rulings of the courts of the home nation of the product will be recognized in the other nation's signatories to the convention. What petitioner is complaining of is that under the convention Canada and Mexico will follow the decision of the Eighth Circuit [148 F. (2d) 909] in this case. That is as it should be. The very purpose of the convention was to establish uniformity in patents and trademarks throughout the North and South American countries.

V.

Petition Does Not Comply With Rule.

This case does not come within the purpose of Rule 38, 5 (b) of this Court, for the decision of the Circuit Court of Appeals, Eighth Circuit (148 F. [2d] 909), is not in conflict with the decision of another Circuit Court of Appeals on the same matter, but, to the contrary, the Eighth Circuit's decision is in harmony with other decisions on the same subject. No question of local law is involved, for the Eighth Circuit's decision is consonant with Missouri decisions on the same or similar subjects. The Circuit Court of Appeals' decision is not untenable or in conflict with the weight of authority. The decision of the Circuit Court of Appeals is in accord with the decisions of this Court on a subject upon which this Court has on several occasions spoken. The Eighth Circuit has not departed from the accepted and usual course of judicial proceedings.

The Circuit Court of Appeals' decision follows what has been recognized as the established law on trademark registration. Petitioner's reasons (p. 4 of its brief) relied on for granting of writ are frivolous.

No important question of federal law is involved. This Court has repeatedly expressed its views on the topic. The case of **Joseph Schlitz Brewing Company v. Houston**

Ice & Brewing Company, 250 U. S. 28, is persuasive here. The Schlitz Brewing Company was one of the first breweries, if not the first, to use amber or brown bottles for beer. Houston Ice & Brewing Company later adopted a brown bottle for its beer, and also had a brown label substantially the same color as Schlitz's brown label. The Circuit Court of Appeals, Fifth Circuit, said that though purchasers of bottled beer might be deceived as to its maker by the color of the bottle or such color in connection with the color of the label, but where all breweries had a right to adopt and use bottles and labels of that color, the resemblance in color between plaintiff's and defendant's bottle beer and label afforded no ground for relief, as the resemblance justifying relief must be in matters which the complaining party has the right to use exclusively. Mr. Justice Holmes, in writing for this Court, and in affirming the Circuit Court of Appeals, said (l. c. 29):

“This is a bill in equity, brought to restrain the use of a trademark alleged to infringe the plaintiff's, or at least to be used in a way that is calculated to deceive and unfairly to interfere with the plaintiff's good will. Both courts have found for the defendant (154 C. C. A. 519, 241 Fed. 817), so that the only question that we shall consider is whether, upon inspection, it can be said as matter of law that the admitted acts of the defendant are a wrong of which the plaintiff can complain.

“Both parties sell beer in brown bottles, with brown labels, and the plaintiff conceded below and still with some unwillingness seems to concede that, although perhaps it first introduced them in this connection and this place, it cannot claim the brown bottle, the brown label, or the two combined. These could be used without a warning, such as sometimes is required, that the beer was not the plaintiff's. The only question is how the additional element,

the form of the inscription, should be treated. It often is said that the plaintiff must show a deception arising from some feature of its own not common to the public."

It is noted that petitioner, not only before the District Court and the Circuit Court of Appeals, but also here, lifts a literary obiter dictum from the Schlitz opinion (brief, p. 24) in support of its position, unmindful that this Court, on a similar state of facts, held against petitioner's position.

VI.

The present case was exhaustively presented during six days of trial before the District Court. Both sides presented printed briefs to the trial court and in due time thereafter the Court filed its findings of fact and conclusions of law dismissing plaintiff's bill. The District Court not only had physical exhibits but, in addition, defendant submitted colored photographs in its brief. The trial court's findings of fact are found on pages 535 and 536 of the record.

The Eighth Circuit Court of Appeals affirming likewise had the physical exhibits before it as well as colored photographs in defendant's brief. The matter was submitted after complete argument wherein the subject apparently was exhausted. That Court (R. 551) said: **"When we compare the appearance of the marks we see no deceptive similarity, and the pronunciation is unlike. We are impressed the contrast is more striking than the similarity."**

The Circuit Court of Appeals also found (R. 552):

"Here there is no evidence of confusion, deception or palming off, notwithstanding the plaintiff and defendants dwell in the same city and have been mar-







**CHEER
UP**

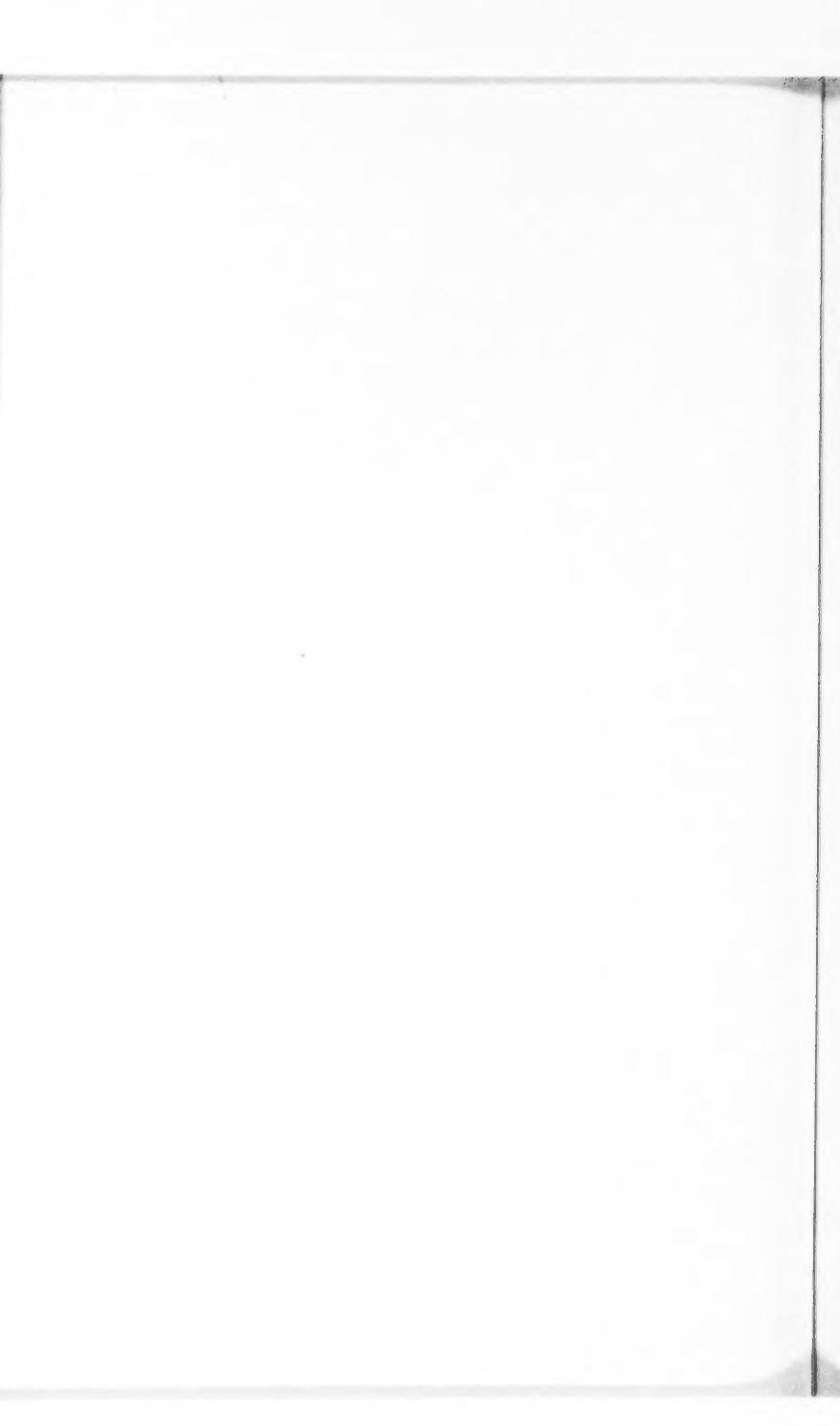
REG. U.S.

PAT. OFF.

A DELIGHTFUL BEVERAGE
**CHEER
UP**
A REAL SUPER - CHARGED MIXER

WITH 50 INT. UNITS
VITAMIN B, ADDED

**CHEER
UP**



keting their goods in the same territory for many years and in the same 'dress' for the past seven years. During this period neither of them has made any substantial change in the type of bottles used or in the labels applied to them. During this period plaintiff never complained or gave notice of alleged infringement or of unfair competition. The question of deception and of palming off, therefore, is one of probability only."

The C. C. A. opinion in full is found on pages 545 to 553 of the record.

In **Miles Laboratories, Inc., v. United Drug Co.**, 112 F. (2d) 814, the Court of Customs and Patent Appeals, at l. c. 817, was of the opinion that the dominant portion of "Alka Seltzer" is the term "Alka," and that the dominant portion of "Rex Seltzer" was the term "Rex," and that the appellant was not entitled to the exclusive use of the word "Seltzer." Found that the term "Rex" in appellee's mark is sufficiently dissimilar from the term "Alka" in appellant's mark so that, when considered in their entireties, the marks are not confusingly similar.

A somewhat similar case (and there are many others of like import) is **Switzer v. Collins**, Court of Appeal, D. C., 23 F. (2d) 775, involving the trade names "Honeymels" and "Buttermels," where the Court said:

"The suffix 'mels' being common to both marks, the distinctive feature is between the words 'honey' and 'butter.'"

Apt is the language of the Court of Appeals for the 7th Circuit in the case of **S. R. Feil Co. v. John E. Robbins Co.**, 220 F. 650. There complainant used the term "Sal-Vet" and the defendant used the term "Sal-Tone," both on similar products. The Court (l. c. 652) stated:

“In the present case defendant has appropriated only the term ‘Sal,’ which he and everyone else was at liberty to use. As between the arbitrary term ‘Vet’ and the word ‘Tone,’ there can be no reasonable claim to resemblance. No ordinary purchaser would take the one for the other, even in combination with the word ‘Sal.’ One is not required to so distinguish his goods that careless buyers will know by whom they are made and sold.”

Resume of Trade Names Not Infringed.

The following summary gives names and citation of cases wherein the Courts, in cases in point, found no infringement. Cases where certiorari was denied are also noted.

Pepsi-Cola and Coca-Cola,

2 D. L. R. 657 (Canada);

Royal Crown Cola and R. C. Cola and Coca-Cola,

New Jersey Court of Chancery;

“Our Country” and “Old Country,”

Wrisley Co. v. Iowa Soap Co., C. C. A., 8th Cir.,

122 F. 796;

“Kickernick” and “Kickaway” in children’s overalls,

Winget Kickernick Co. v. LaMode Garment Co.,

42 F. (2d) 513;

Same-Kresge v. Winget, C. C. A., 8th Cir., 96 F.

(2d) 978;

Rubberoid and Rubbero,

Standard Paint Co. v. Trinidad Asphalt Mfg. Co.,

220 U. S. 446, 31 S. Ct. 456;

Dixi-Cola and Coca-Cola,

Dixi-Cola Laboratories v. The Coca-Cola Co., 117

F. (2d) 352, C. C. A., 4th Cir., **cert. denied**, 62

S. Ct. 60;

Barunduck and Burundell’s,

Sidney Blumenthal v. Salt’s Textile Mfg. Co., 21

F. (2d) 470;

- Dysco and Selco,
Davies-Young Soap Co. v. Selig Co., 16 F. (2d)
352, Ct. of Ap. D. C.;
- Union World and Union Leader,
American Tobacco Co. v. Globe Tobacco Co., 193
F. 1015;
- Zonite and Zonox,
18 T. M. R. 59;
- Palm Beach and Palm Knit,
Goodall Worsted Co. v. Palm Knitting Co., 10 F.
(2d) 1013; Ct. of Ap. D. C.;
- Liebro and Helbro,
19 T. M. R. 382;
- Blue Ribbon and Blue Anchor,
Premier Malt Products Co. v. Kasser, 23 F. (2d)
98, 26 F. (2d) 1021; C. C. A., 3rd Cir.;
- Valvoline and Havoline,
Valvoline Oil Co. v. Havoline Oil Co., 211 F. 189;
- Fashionknit and Fashion Club, or Fashion Park,
Franklin Knitting Mills v. Kassman & Kessner, 13
F. (2d) 319; Ct. of Ap. D. C.;
- College Comics and College Humor,
Collegiate World Pub. Co. v. Du Pont Publ. Co.,
14 F. (2d) 158, 25 F. (2d) 1018, C. C. A. 7th;
- Quin-Coco and Quin-Quinine,
Warner v. Lilly, 265 U. S. 526;
- Hot Shot and Hot Patches,
Shaler Co. v. Rite-Way Products Co., 107 F. (2d)
82, 6th Cir., **cert. denied**, 310 U. S. 634;
- Syneromatic and Air-O-Matic,
Syneromatic Conditioning Corp. v. Williams Oil-
o-Matic Heating Corp., 109 F. (2d) 784, C. C.
P. A.;
- Turnlox and Speedlox,
Benjamin Electric Co. v. Bright Light Reflector
Co., 29 F. Sup. 790, aff. 111 F. (2d) 880, C. C.
A. 7th;

- Cream Wipt and Miracle Whip,
Kraft-Phenix Cheese Corp. v. Levin, 29 F. Sup.
813;
- Steem Electric and Steam-O-Matic,
Steem Electric Corp. v. Herzfeld-Phillipson Co.,
29 F. Sup. 1011;
- Resistal and Resista,
Corning Glass Works v. Pasmantier, 30 F. Sup.
477;
- Municipal Street Sign Co., Inc., v. City Street Sign
Corp., 30 F. Sup. 795;
- Sun-ees and Cool-ees,
Joyce, Inc., v. Fern Shoe Co., 32 F. Sup. 401;
- Rotabin and Ro-Tray,
Frick-Gallagher Mfg. Co. v. Rotray Corp., 33 F.
Sup. 727;
- Star Plug Tobacco and Starlight Plug Tobacco,
Liggett & Myers Tob. Co. v. Finzer, 128 U. S. 182;
- Coates "Best Six Cord" and Merrick "Best Six
Cord,"
Coates v. Merrick, 149 U. S. 562, 13 S. Ct. 966;
- No-To-Bac and Baco-Curo,
Sterling Remedy v. Eureka Chemical, 80 F. 105,
C. C. A. 7th;
- American Lady and American Girl, if name of maker
is shown,
Hamilton-Brown v. Wolf Bros., 240 U. S. 251;
- Vapex and Vapo-Rub,
Vick Chemical Co. v. Thomas Kerfoot & Co., 80
F. (2d) 73, C. C. P. A.;
- "H. M." and "M. M.,"
McDonald & Morrison Mfg. Co. v. H. Mueller Mfg.
Co., 183 F. 972, C. C. A. 8th;
- Picture of St. Louis Union Station on cigar boxes, one
labeled "Union Station, St. Louis," and the other
"Gilpin, Union Station,"
Nicholson v. Stickney, 158 Mo. 158;

Solventol and Solvite,

Solventol Chemical Products Co. v. Langfield, 134
F. (2d) 899, C. C. A. 6th;

Kurlash and Starlash,

Younghusband v. Kurlash Co., 94 F. (2d) 230,
C. C. P. A.;

Houston Post-Dispatch and St. Louis Post-Dispatch,

Pulitzer Publishing Co. v. Houston Printing Co.,
11 F. (2d) 834, C. C. A. 5th., **cert. denied**, 273
U. S. 694;

Opalite and Oplex,

Flexlume Sign Co. v. Opalite Sign Co., 292 F. 98,
C. C. A. 7th., **cert. denied**, 263 U. S. 718;

Cuticle Soap and Cuticura Soap,

Potter Drug & Chemical Co. v. Pasfield Soap Co.,
102 F. 490;

Roof Leak and Never Leak,

Sears, Roebuck v. Elliott Varnish Co., 232 F. 588,
C. C. A. 7th., **cert. denied**, 242 U. S. 635;

Bouquet des Amours and Fleurs D'Amour not in-
fringed by Charme D'Amour or Caresse D'Amour,

Parfumerie Roger & Gallet v. M. C. M. Co., 24 F.
(2d) 698, C. C. A. 2nd;

Roxa Kola and Coca-Cola,

Coca-Cola Co. v. Carlisle Bottling Co., 43 F. (2d)
101, 43 F. (2d) 119, C. C. A. 6th., **cert. denied**,
282 U. S. 882;

Krank's Lather Kreem and Twilight Lather Cream,

Frank v. Pabst, 277 F. 15, C. C. A. 6th;

Narcisse Noir and Narcisse Juane,

Caron v. Vivaudou, 4 F. (2d) 995, C. C. A. 2nd;

Blue Whirl and Blue Streak not infringed by Blue Tip,

Turner & Seymour v. A. & J. Mfg. Co., 20 F. (2d)
298, C. C. A. 2nd;

Sal-vet and Sal Tone,

Feil v. Robbins, 224 F. 650, C. C. A. 7th;

Spearmint not infringed by Peptomint,
Larson v. Wrigley, 253 F. 914, C. C. A. 7th, **cert.
denied**, 248 U. S. 580;

Dysco not infringed by Selco,
Davies-Young v. Selig, 16 F. (2d) 352, Ct. of Ap.
D. C.;

Buttermels not infringed by Honeymels,
Switzer v. Collins, 23 F. (2d) 775, Ct. of Ap. D. C.;

Speedex not infringed by Speedway,
AnSCO Photoproducts v. Eastman Kodak, 19 F.
(2d) 720, Ct. of Ap. D. C.;

Everlasting not infringed by Evertight,
Everlasting Valve Co. v. Schiller, 21 F. (2d) 641;

Blony a name for bubble gum not infringed by Bubly
for same product,
Gum, Inc., v. Gumakers of America, 136 F. (2d)
957, C. C. A. 3rd;

Pyrex not imitation of Rex,
Walgreen v. Obear-Nester, 113 F. (2d) 956, 8th
C. C. A., **cert. denied**, 311 U. S. 708;

As to packages common to the trade,
P. Lorillard Co. v. Peper, 86 F. 956, C. C. A. 8th,
cert. denied, 171 U. S. 690; Joe Schlitz Brew-
ing Co. v. Houston Ice & Brewing Co., 250
U. S. 28.

Registrations of "7" and "Up" Prior to Petitioner's Registration.

The numeral "7" and the word "up" were used by others before plaintiff registered. "Seven Up" was registered as a trade-mark for citrus fruit on February 1, 1916. Combinations using "7" and "up" have been numerous prior to plaintiff's January 7, 1936, registration (Deft's X. 52, R. pp. 452-464):

For Jack Daniels whiskies "Old No. 7," May 24, 1904;
"Pik-Me-Up" for a non-alcoholic beverage, May 28,
1907;

"Seven-Eleven" and "7-11" for certain medicine,
August 13, 1907;

"Bubble-Up" for a non-fermented, non-alcoholic soft
drink, April 12, 1921;

For playing cards "7-11," February 14, 1922;

"7-11" for candies, July 24, 1943;

"7 Fruits" for food flavoring extracts, July 31, 1923;

"Six Up" for candies, November 27, 1923;

"Two-Up" for golf balls, February 19, 1924;

"Seven-Eleven" for hosiery, November 17, 1925;

"One-Up" for tobacco cases or pouches, Feb. 9, 1926;

"7-11" for wheat flour, February 23, 1926;

"7-11" for candies, August 16, 1927;

"Lucky 7" for floor mops, September 6, 1927;

"Pick-Me-Up" for a non-alcoholic, non-cereal soft
drink, November 20, 1928;

"7 Fruits" for non-alcoholic, non-cereal soft drinks,
January 8, 1929;

"7-11" for fresh grapes, January 8, 1929.

Plaintiff in 1943 purchased from Anheuser-Busch the
trade-mark "Pickmeup" registered in the Patent Office by
Lysander D. Childs in May, 1907 (R. p. 516). "Bubble-
Up" was registered in the Patent Office in 1919. Both are
names for soft drinks and both trade names with "up"
in them antedated 7 up by many years.

CONCLUSION.

Respondents believe it appropriate here to quote Wool-
sey, District Judge, in **Radio Corporation of America v.
Decca Records**, 51 F. Sup. 493, l. c. 497, for his language
also correctly characterizes the plaintiff here. He said:

“I am almost persuaded that what the plaintiff dislikes is not what it is pleased to call ‘unfair competition,’ but is any competition at all.”

Respondents respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

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